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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 994

HYDRO-LINE MANUFACTURING CO., *Petitioner*

v.

FLICK-REEDY CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUBJECT INDEX

	PAGE
Opinions of the Courts below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statutes involved	3
Statement of the case	5
Reasons why the writ should be granted	7
1. As to the patent-like copyright monopoly	7
2. As to a patent applicant's standard of conduct.	13
Conclusion	17

Appendix—Opinion of the Court of Appeals for the Seventh Circuit.

TABLE OF AUTHORITIES CITED

Cases:

Baker v. Selden, 101 U.S. 99 (1879)	9
Holmes v. Hurst, 174 U.S. 82, 86 (1898)	8
Mazer v. Stein, 347 U.S. 201 (1953)	8
Precision Instrument Mfg. Co. v. Automatic Maintenance Machinery Co., 324 U.S. 806, 815, 816 (1945)	16
Samson and Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1 Cir., 1905)	7, 10
Walker Process, Inc. v. Food Machinery and Chemical Corporation, 15 L. Ed 2d 247, 86 S Ct. .., 147 USPQ 404 (1965)	16

Constitutional Provision and Statutes:

United States Constitution, Art. I, Sec. 8, clause 8	3
United States Code, Title 17, Sec. 1	3
United States Code, Title 17, Sec. 7	3
United States Code, Title 35, Sec. 102(a), (b)	3
United States Code, Title 35, Sec. 282	4

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Your petitioner, Hydro-Line Manufacturing Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is printed in the Appendix hereto, *infra*, pages 1a to 11a inclusive, and is reported at 351 F. 2d 546. The opinion of the District Court for the Northern District of Illinois is reported at 241 F. Supp. 127 and is printed at pages 673-700 of the Joint Appendix in the Court of Appeals for the Seventh Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered September 14, 1965, and a timely

Petition for Rehearing was duly filed and was denied by that Court on November 10, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) to review the aforesaid judgment.

QUESTIONS PRESENTED

1. With respect to the Copyright:

Is it proper for the Court of Appeals to grant a patent-like monopoly on the mere idea of expanding on previous explanations of mathematical data tables and formulae which were in the public domain and which, in this case, were found by the Court of Appeals to have been independently calculated by Defendant?

Subsidiary to this question are the following:

a. Is not every member of the public free to formulate and publish his own instructions for the use of mathematical data calculated independently by him and previously existing in the public domain?

b. Can a copyright based on "abridgments, adaptations, arrangements . . . or works republished with new matter . . ." as set forth in 17 U.S.C. 7 dominate the mere idea of positioning mathematical data tables on one side of a page and explanations of the use of the table on the other side?

2. With respect to patent No. 2,798,777:

Do the holdings of the District Court and the Court of Appeals of the validity of the patent amount to approval of a standard of fraudulent conduct which is clearly improper under previous decisions of this Court?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I, Section 8, clause 8, of the Constitution of the United States provides:

> "The Congress shall have power
>
> * * *
>
> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

17 U.S.C. 1 provides:

> "§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;"

17 U.S.C., Sec. 7 ..... 11, 67

> "COPYRIGHT ON COMPILATIONS OF WORKS IN PUBLIC DOMAIN OR OF COPYRIGHTED WORKS; SUBSISTING COPYRIGHTS NOT AFFECTED.—Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

35 U.S.C. 102 provides:

> "§ 102. Conditions for patentability; novelty and loss of right to patent
>
> "A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, . . ."

35 U.S.C. 282 provides:

"§ 282. Presumption of validity; defenses

"A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

"The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement, or unenforceability,

(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,"

STATEMENT OF THE CASE

In this case, Plaintiff, Flick-Reedy Corporation has charged Defendant, Hydro-Line Manufacturing Co., with infringement of two patents Nos. 2,798,777 and 2,842,284 and a copyright on a sales bulletin of Plaintiff.

The first question deals with pages 9 and 10 of Defendant's catalog No. SR2-57B and Plaintiff's assertion that these pages infringe two of the thirty-two pages of Plaintiff's 1958 catalog, Bulletin JH-104N, the subject of Plaintiff's copyright registration No. A-338557. The first of Defendant's pages contains engineering data on column strength in the form of a chart of mathematically derived figures with instructions for their use. The other page relates to acceleration-deceleration forces and contains a chart of values computed using one of Newton's laws and instructions for the use of that chart.

Defendant's page 9 in question was a revision and amplification of a 1957 publication of Defendant including a data table with most of the values of the table on page 9 plus instructions for use of the data. The data of the table on page 10 of Defendants' bulletin was independently calculated by Defendant as found by the Court of Appeals but also was in the public domain due to Plaintiff's dedication of such data to the public. Plaintiff's two pages were merely revisions and amplifications of previous uncopyrighted publications of Plaintiff.

Engineering information of this type is used by cylinder customers to determine sizes of cylinders and conditions of use and, in order for Defendant to compete on a fair basis with Plaintiff, Defendant should be entitled to supply such information to customers. The situation is akin to a bank's promotion of its services by giving to customers income tax or other rate schedules with instructions for

their use. In neither case is anyone entitled to exclusive rights in the data or the idea of explaining its use.

The District Court, after an extended trial with many witnesses in addition to documents, held that Defendant, Hydro-Line Manufacturing Co., had not infringed Plaintiff's copyright and found specifically that Defendant arrived at the accused pages through independent and original creative efforts (Finding Nos. 52 and 57, Joint Appendix, pages 693 and 695). The Court of Appeals reversed the District Court and held that it had erred in finding no infringement and no substantial copying of the two pages in question. At the same time, however, the Court of Appeals (Appendix hereto, page 4a) made this comment with respect to the charts:

> "We set aside the question of the computations in the charts, which the district court could well have found, if need be, were independently calculated by Hydro-Line."

As a basis for the reversal of the District Court, the Court of Appeals said (Appendix hereto, pages 3a and 4a):

> (a) "Hydro-Line had the same purpose in compiling and publishing its material as Flick-Reedy had,"
>
> (b) Hydro-Line "did not merely use the latter's [Flick-Reedy's] work as a starting point for further development of the ideas expressed,"
>
> (c) Defendant had no right "to use its bulletin to interfere seriously with Flick-Reedy's gainful use of its bulletin for prestige and trade in the cylinder market."

In this holding, the Court of Appeals is interfering with Defendant's rights to compete with Plaintiff and is granting to Plaintiff an exclusive right to the subject matter as in the case of a patent rather than merely the right to prevent others from copying.

The second question deals with patent No. 2,798,777 and the propriety of certain representations made by the patentee while attempting to persuade the Patent Office that the patent should be granted. This patent is one of two in suit and it discloses a mounting for hydraulic and pneumatic cylinders.

During the prosecution of the patent, the patentees argued that certain features of the patent construction were new and not shown in the Patent Office references. At that time however, as later admitted by one patentee, the features were old in the Plaintiff's own prior constructions.

The other patent in suit, No. 2,842,284 also relates to cylinders and was held invalid by the District Court which concluded (Conclusion of Law No. 10, Joint Appendix, page 698) that the patent was "unenforceable by reason of Plaintiff's inequitable conduct in misrepresenting the status of prior art, known to Plaintiff, to the Patent Office." The District Court, as affirmed by the Court of Appeals, also held patent No. 2,842,284 invalid and unenforceable by reason of Plaintiff's withholding from the patent and retaining as a trade secret specific information on a "special tool" used to finish critical surfaces of the cylinder.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. As to the Patent-Like Copyright Monopoly

Although this Court has consistently drawn a clear distinction between the rights acquired by a patent and those acquired by copyright, the Court of Appeals erroneously construed the copyright law as set forth in a 60 year old case in the First Circuit, *Sampson and Murdock Co.* v. *Seaver-Radford Co.*, 140 Fed. 539 (1st Cir. 1905), and

reached a result giving Plaintiff exclusive rights to the subject matter, that is, the art itself, in conflict with this Court's decisions regarding the protection afforded by copyright. The distinction between patents and copyrights appears in the famous case of *Mazer* v. *Stein,* 347 U.S. 201 (1953). There, pages 217, 218, this Court said:

> "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.[39] Thus, in *Baker* v. *Selden,* 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings."
>
> * * * * *
>
> ". . . The copyright protects originality rather than novelty or invention—conferring only 'the sole right of multiplying copies.'[41] Absent copying there can be no infringement of copyright."

An earlier expression of what rights one can acquire by copyright is found in *Holmes* v. *Hurst,* 174 U.S. 82, 86 (1898), where the Court said:

> "The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or, as Lord Mansfield describes it, 'an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever.' 4 Burrows, 2396. The nature of this property is perhaps best

defined by Mr. Justice Erle in *Jefferys* v. *Boosey,* 4 H. L. C. 815, 867: 'The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.' "

Still earlier was *Baker* v. *Selden,* 101 U.S. 99 (1879) which was discussed in *Mazer* v. *Stein.* Regarding the extent of protection afforded by copyright, the Court there said, pages 100, 101, 102 and 103:

". . . Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account-books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system."

* * * * *

". . . The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government."

* * * * *

> "The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application."

Summarizing the foregoing pronouncements, a copyright, unlike a patent, protects only against copying of the expression of an idea, that is, the order of words, and cannot extend to the words used or the ideas. Stated another way, no one including the Plaintiff in the case now before the Court is entitled to exclusive rights to the subject matter of tables of mathematically calculated figures with instructions for their use.

In spite of the clarity of this Court's decisions, the Court of Appeals' holding amounts to granting Plaintiff an exclusive right to the subject matter of the pages in question. Specifically, the Court of Appeals, 35 F. 2d 546 (Appendix hereto, page 3a), referred to *Sampson and Murdock Co.* v. *Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905) and said:

> ". . . Applying the rules stated there to the issue before us, we see that Hydro-Line had the same purpose in compiling and publishing its material as Flick-Reedy had, and that it did not merely use the latter's

> work as a starting point for further development of the ideas expressed."

The Court of Appeals thus denies that Defendant, Hydro-Line, either can have the same purpose as Plaintiff, Flick-Reedy, or that Hydro-Line can start at the same point as Flick-Reedy. To require Defendant to start where Plaintiff left off is to say that no one other than Plaintiff can work this art. This gives Plaintiff a patent-like monopoly.

Not content to give Plaintiff a patent-like monopoly on the subject matter of the pages in issue, the Court of Appeals went even further. They said (Appendix hereto, pages 3a and 4a) that Defendant had no right "to use its bulletin to interfere seriously with Flick-Reedy's gainful use of its bulletin for prestige and trade in the cylinder market." This statement of the Court of Appeals is surprising because the record is completely devoid of any evidence that Defendant's bulletin has interfered in any way with Plaintiff's use of its bulletin. Indeed, the record shows that cylinder customers sometimes figure out the same mathematical data for themselves (Joint Appendix, page 234).

The Court of Appeals compared Defendant's and Plaintiff's pages in question at some length (Appendix hereto, pages 4a and 5a). While this comparison did show that Plaintiff and Defendant were dealing with the same subject matter or idea, it was especially significant in showing more differences than similarities. In other words, by the Court's own comparison, Defendant's expression of the common idea is different from Plaintiff's. The only similarities found by the Court of Appeals in that comparison are the positioning of a table and instructions on one side and cylinder drawings on the other side of

Defendant's page 9 and, in the case of page 10, the positioning of a table on the left and instructions on the right.[1] Any other similarities such as the presence of similar words, for example, "bearing wear," "acceleration," and "deceleration," necessarily occur because the same subject matter is being treated.

While the District Court held that Defendant's publication was independently created, the Court of Appeals held that there was copying based solely on access, dealing with the same mathematical subject matter, and the placement of tables on one side of the page and instructions for use on the other. This is not a proper basis for a finding of copying where both parties are entitled to deal with the same mathematical subject matter.[2] This is particularly true where the written texts are different in mode of expression. It is even more true where the copyright is at best only for a revision or adaptation of works in the public domain, as is the case here.

The Court of Appeals could not have considered the placement of tables on one side of the page and instruc-

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[1] The mathematical formula and data involved were in the public domain prior to the publication of Plaintiff's bulletin or were published by Defendant (District Court Findings Nos. 47, 48, 49, 51, 55, 56, 57, Joint Appendix, pages 691-695). The color red was used by Hydro-Line in its charts and bulletins and Defendant also used charts on one side of a page in its bulletins with instructions on the other side prior to publication of Plaintiff's 1958 bulletin (Defendant's Exhibit No. 64). The seven diagrams of cylinders on page 9 of Defendant's bulletin correspond to the seven diagrams of Defendant's 1957 publication (DX 81) prior to the 1958 publication of Plaintiff's copyrighted bulletin.

[2] It is significant that there was no direct evidence of copying. The only direct evidence was to the contrary, this evidence consisting of documents and testimony of Defendant's personnel whom the District Court had the opportunity to hear and observe whereas the Court of Appeals had only the record.

tions on the other as an infringement because positioning is not a "writing" in the sense of the Constitution or of the Copyright Statute. No claim is made by the Plaintiff that the pages in question have any degree of artistic merit.

If positioning is the criterion, then the legal effect is similar to that of a patent monopoly. There are only a limited number of relative positions of charts and mathematical instructions available on a page and, if any one may be dominated by copyright, then all may be dominated. This then creates a monopoly of the art itself rather than a particular manner of expressing one's ideas about an art.

The compelling conclusion from a study of the decision of the Court of Appeals, as discussed above, is that, by saying that Defendant could not have the same purpose and could not start at the same point as the Plaintiff, that Court granted Plaintiff a patent-like monopoly on the subject matter. This clearly is in conflict with applicable decisions of this Court and therefore comes within Rule 19.2.(b) so as to be properly reviewable on writ of certiorari. The decision further is contrary to the intent of the Constitution and the applicable Copyright Statutes, particularly 17 U.S.C. 7 which prohibits a copyright on works republished with new matter from extending the copyright in the original work.

2. As to a Patent Applicant's Standard of Conduct

One applying for a patent naturally is enthusiastic about his creation and is eager to convince the Patent Office of its value. In this effort, the applicant, or his attorney, often is overcome by his enthusiasm and makes careless statements of the relative merits of his device and the prior art. While inaccuracies may creep into this comparison on some occasions, the enthusiasm of the advocate

has exceeded proper bounds on other occasions and actual misrepresentations occur. The public has a direct interest in such proceedings and this interest should be protected by the establishment and maintenance of a proper standard of conduct by patent applicants.

In the case of one patent here in suit, No. 2,842,284, the District Court concluded the patent "is unenforceable by reason of Plaintiff's inequitable conduct in misrepresenting the status of prior art, known to Plaintiff, to the Patent Office." (Conclusion of Law No. 10, Joint Appendix, page 698). The District Court, however, applied a *different standard with respect to the other patent in suit,* No. 2,798,777, and failed to reach a similar conclusion even though the patentees were guilty of *substantially identical misrepresentations of the prior art.* These were not mere failures to call the attention of the Patent Office to certain prior art, but were actual statements that two features of their device were new when, in fact and as admitted by one of the patentees (also the patentee of the other unenforceable patent and the president and owner of the plaintiff), they were old in Plaintiff's own constructions which were not before the Patent Office.

In the case of patent No. 2,842,284, the patentee Flick argued in the Patent Office that a reference patent showed the "only" known type of connection used in high pressure pneumatic and hydraulic equipment. This was a misrepresentation because, at the time of making the argument and for several years prior thereto, Plaintiff's own cylinder had a different type of connection similar to the one sought to be patented (District Court Finding No. 29 and Conclusion of Law No. 10, Joint Appendix pages 686 and 698). That patent was held unenforceable because of such conduct.

During the prosecution of the other patent No. 2,798,777 now in question, the patentees argued that it was new (a)

to mount the heads of cylinders against the base and (b) to align mounting bolt holes with the respective tie rods. With respect to (a) mounting of the heads against the base, one patentee, Mr. Flick, clearly admitted that this was old prior to the patent construction when, in his deposition before trial (DX 119a, p. 275), he said:

> "... resting on the side of the head is not new. It has been used by us since we first came out with cylinders and by others."

An example of such prior use by Plaintiff is its A71 mount which was discussed as follows by Plaintiff in response to Defendant's request for admission, No. 43. (Joint Appendix, page 256):

> "... the mounting may have in some instances permitted the head to contact the supporting base....".

Defendant's expert, Dean Fischer, also testified to this effect (Joint Appendix, pages 621, 622, 624).

The other feature, (b) longitudinal alignment of the mounting bolt holes and the tie rods, also was known by the patentees prior to the evolution of the cylinder mount of the patent. The most pertinent prior art structure showing this feature again was Plaintiff's own A71 mount. This was clearly admitted by Mr. Flick who, in his testimony discussing the A71 mount, said (Joint Appendix, page 216):

> "We had six bolt holes, three at each end. Two of the three at each end were in line with the tie rods, that is correct."

The District Court thus obviously applied *two different standards to substantially identical misconduct of the patentees* during prosecution of the respective patents. The standard applied in declaring patent No. 2,842,284 unenforceable is consistent with applicable decisions of this

Court. This declaration was not disturbed by the Court of Appeals.

In upholding the validity of the other patent No. 2,798,777 the District Court applied a different and improper standard in conflict with applicable decisions of this Court. The Court of Appeals carried this clear error forward by affirming the validity of the patent and thereby failing to recognize or condemn the patentees' inequitable conduct.

As recently as December, 1965, in the case of *Walker Process, Inc.* v. *Food Machinery and Chemical Corporation,* 15L. Ed. 2d 247,86 S. Ct. ....., 147 USPQ 404, this Court affirmed its long standing decisions that the validity of a patent may be attacked on the ground of fraudulent procurement. Among other cases cited by the Court there is *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U.S. 806 (1945). In the *Precision* case, the rule was stated as follows, pages 815, 816:

> "A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and useful Arts.' At the time time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."

The decisions of the District Court and the Court of Appeals upholding the validity of patent No. 2,798,777 not only are in conflict with the applicable decisions of this Court, but also, they condone a standard of conduct which is clearly contrary to public policy and which neither this nor any other Court should tolerate. Such decisions

of the District Court and Court of Appeals call for the exercise of this Court's power of supervision and the reaffirmation by this Court of the proper standard of conduct which must be maintained in Patent Office proceedings.

CONCLUSION

This Petition for Writ of Certiorari should be granted by this Court in the exercise of its supervisory powers. It should be granted because the decision of the Court of Appeals is in serious conflict with applicable decisions of this Court and is contrary to the intent of the applicable Constitutional provision and statutes.

Respectfully submitted,

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